contention that it was the wrongful repudiation of the contract by the main contractor that had resulted in the non-performance of the contract by the subcontractor.

The subcontractor had also contended that if, the insurance company in response to the demand made on it by the main contractor made the payment of the 5% of the contract sum prior to the disposal of the action, "irreparable damage and loss may be occasioned to the plaintiff and its directors in their personal capacities which cannot be readily compensated for in damages".

In my judgment, the subcontractor, having admittedly delivered the "insurance guarantee agreement" to the main contractor in purported compliance with the contractual requirement to provide the required performance bond, cannot be heard to challenge its validity. In any event the issue of its validity seems to me to be a matter between the alleged parties to the agreement, namely, the main contractor and the insurance company.

As has been seen, as between the main contractor and the insurance company, if in fact there was a valid guarantee of due performance, then on demand the insurance company would have to pay out the amount guaranteed "unless the subcontractor was relieved from the performance by any clause of the contract or by statute or by the decision of a tribunal . . .". It is common ground that the subcontractor was not relieved by any statute or the decision of a tribunal. What then is left is relief from performance by a clause of the contract. I pause to observe that this is not synonymous with "relief from performance by the breach of a clause of the contract". My attention has not been drawn to any clause in the contract that *per se* relieves the subcontractor from performance. The subcontractor in fact does not rely on any such clause. Its cause of action is stated to be the unreasonable repudiation of the contract. The alternative cause is stated to be the breach of clause 4(i) of the contract. It might very well be that the main contractor was in breach of the contract and had acted unreasonably or was responsible for forcing the subcontractor not to perform. But on the principles laid down in *Edward Owen Engineering Ltd.* v. *Barclays Bank International Ltd* [1] and also in *R.D Harbottle* v. *National Westminster Bank*,[2] the guarantor cannot be prevented from paying out the money demanded. In my judgment, it follows that neither can the main contractor be restrained from recovering the money. In providing the performance bond, it will have to be assumed that the subcontractor was aware that the insurance company or guarantor would have to pay out even in the face of any "contestation or protest" by the subcontractor. The subcontractor's remedy is to sue the main contractor for damages as it has in fact done. In the meantime the main contractor cannot be stopped from seeking to be paid pursuant to the performance bond. If the plaintiff succeeds in its action, that the defendant had drawn on the performance bond, can and will no doubt be taken into account by the Court in assessing damages.

The interim injunction granted to the plaintiff on February 15, 1985 (see the Order, enclosure (9)) is dissolved. The Senior Assistant Registrar of the Court shall upon application therefor inquire into and assess the damages (if any) suffered by the defendant as a result of the said interim injunction having been granted and the plaintiff shall pay to the defendant such damages and the costs of and incidental to such inquiry and assessment as well as the costs of an incidental to this motion.

Order accordingly.

Solicitors : *Sri Ram, Zulkifly & Kumar; David Lingam & Co.*

BORHANUDDIN BIN HAJI JANTARA & ORS. v. AMERICAN INTERNATIONAL ASSURANCE CO. LTD.

[O.C.J. (George J.) June 4, 1985]

[Kuala Lumpur – Civil Suit No. 2785 of 1978]

Insurance – Life insurance premium paid on December 2 – Proposal contained stipulation insurance not to be effective till policy issued – Receipt also laid down that it did not amount to acceptance – Payer died on December 4 – Insurance company not liable.

Contract – Payment of insurance premium does not amount to acceptance of proposal – Risk to commence on issuance of policy – No concluded contract.

In this case one Azian binti Borhanuddin had completed a document entitled "Application for Life Assurance" in the insurance company (AIA). The form of proposal ended with a declaration signed by Azian which provided that 'The assurance herein applied for shall not take effect unless and until policy issued and delivered to me ..."

On December 2, 1977, a cashier's receipt for first premium, in favour of Azian was issued. At the back of the receipt it was printed that "said receipt is issued only for the account of the payer, and the company is no way committed, thereby to the acceptance thereof ..." No policy was issued and unfortunately Azian died in an aircrash on December 4, 1977. A claim was filed on the insurer by her father and the other administrators of the estate. The insurer repudiated the liability on the ground that there was no concluded contract.

Held: (1) receipt of the amount of $118 does not amount to a waiver of the understanding between Azian and AIA set out in the declaration that the assurance applied for was not to take effect until a policy was issued and delivered to Azian and the first premium actually paid in full;

(2) there is no evidence to show as to how much the premium was and what the $118 represented;

(3) there was no concluded contract of insurance between her and AIA and accordingly the claim failed.

Cases referred to:

(1) *Chapelton* v. *Barry U.D.C* [1940] 1 K.B. 532.
(2) *Burnett* v. *Westminster Bank Ltd.* [1965] 3 All E.R. 81.
(3) *Olley* v. *Marlborough Court Ltd.* [1949] 1 K.B. 532.

CIVIL SUIT.

Mohamed Yacob Karim for the plaintiffs.
T. Thomas for the defendants.

Cur. Adv. Vult.

George J. : Azian bte. Borhanuddin was 19 years of age. She was employed as an Air Stewardess with the Malaysia Airline System Berhad and in that capacity was on duty on their ill-fated Flight MH 653 which crashed at Tanjong Kupang, Johore on December 4, 1977 with tragic results. Azian bte. Borhanuddin was one of those who died in the crash.

It turned out that just a few days earlier, on or about November 21, 1977, Azian had completed a document entitled "Application for Life Assurance in American International Assurance Co. Ltd." The document was dated November 21, 1977 and clearly was a proposal for insurance by her to the insurance company (AIA) the proposed cover being for $50,000.00 on her life the policy to mature on death or when she attained 55 years of age whichever was the earlier. The form of proposal showed that she sought an additional accident cover of $50,000.00 It also showed that she proposed to pay the premium on a monthly basis.

The form of proposal ends with a declaration signed by Azian, clause (c) whereof is as follows:

> "(c) The assurance herein applied for shall not take effect unless and until a policy is issued and delivered to me on this application and the first premium thereon actually paid in full during my lifetime and good health, provided, however, that if any payment of premium is made in cash at the time of signing this application and a conditional receipt issued therefor, the terms of the receipt shall apply hereto and are agreed to."

It would appear that the proposal form reached the Underwriting Department of the AIA on December 5, 1977 – there is a stamped endorsement to that effect on it. One Kenny Goh Poh Lai from the Underwriting Department of AIA conceded that it could have been received earlier by some other department of the company before it had been passed on to the Underwriting Department. It was for his department to consider and recommend the acceptance or rejection of the proposal.

At the top of the proposal form, there is a space allotted for "Policy Number" which space was filled with the number R55-205520-2. Kenny Goh explained that each applicant for insurance is treated as a case and each case is allotted a number by a department called the Agency Department. The said number on Azian's proposal according to Kenny Goh was such a number. If a proposal is accepted and a policy issued that number will become the number of the policy. If the proposal is rejected the number will continue to be the number of the case. It will not be allotted to any other case or policy. Kenny Goh said that at the relevant period the Underwriting Department handled in the region of some 40 proposals for insurance every day some of which could be rejected. He estimated that on the average about 1% of the proposals considered would be rejected.

Kenny Goh was of the opinion that Azian's proposal must have been received by the AIA on December 5, 1977 in that normally proposals received would be forwarded to the Underwriting Department on the very day they were received. However it is on record that on December 2, 1977 AIA's cashier issued a receipt in favour of Azian for $118.00 (Exhibit A4). There are a number of boxes in the receipt format the ticking off of which would indicate what the payment was for. However none of the boxes including the box for "Due Premium" were ticked off. On the receipt under the words "App/Policy No." is set out the said number R55 2055202. Immediately under-

neath this is a box for "effective/due date". The cashier had omitted to fill in the box with such a date. Instead a line had been drawn in this box which suggests that either there was no such date or that the cashier was not aware of such effective or due date in respect of the case. At the back of the receipt is printed the following notice:

"*Conditions of Payment*

Said sum is received only for the account of the Payer, and the Company is in no way committed thereby to the acceptance thereof for the purpose offered nor to any action in the premises and nothing herein or connected with the receipt of said sum shall be held to waive default in payment of any premium, interest or other sum due, or to extend the time for payment of any premium interest or other sum, or in any manner to affect the rights of the Company under any policy or contract of assurance or with respect to any application submitted to the Company for group or individual assurance or otherwise. If the said amount be not accepted by the Company for the purpose offered it will be returned to the Payer in the usual course of business.

Any payment tendered otherwise than in cash is received for the account of the Payer, subject to collection and the receipt of actual payment by the Company."

The claim is by the estate of Azian and is on the basis that Azian's life was at the time of the accident covered by AIA for $50,000 with the additional benefit of another $50,000.00 since her death was accidental.

It seems to me that there can be no doubt that Azian's proposal was received by the company on or before December 2, 1977 since the cashier issuing the receipt on December 2 was able to put on the receipt the relevant case number R55 2055202 which must have been allotted after the proposal had been received by AIA. However in the face of Kenny Goh's testimony and because of the date stamp on the reverse of the proposal form I had to and accept that the proposal form was delivered to the Underwriting Department of AIA only on December 5, 1977. I also have to and accept Kenny Goh's evidence that it was the Underwriting Department that processes proposals for insurance and recommends whether to accept or reject proposals.

Kenny Goh had testified that in respect of Azian's proposal a policy was not issued. He said that his department would have only given consideration to the proposal after it was received by the department on December 5, 1977. Normally according to Kenny Goh the processing of a proposal by the Underwriting Department would have taken some four to seven days after it was received by that department. He also said that in the normal course of events the probabilities were that his department would have recommended that Azian's proposal be accepted. However he testified that he had been instructed by his superior to withhold issuing a policy in this case. In examination-in-chief he had said that these instructions were given in January 1978. In cross-examination he said that those instructions must have been given sometime in December 1977. Kenny Goh was emphatic that AIA had not accepted the proposal and a policy was not issued.

The stand taken by the defendant insurance company AIA is that there was no concluded contract of insurance between Azian and AIA – in any event that there was no liability on AIA in that a policy of insurance had not been issued and delivered which was a condition precedent for the assurance applied for to be effective which condition precedent Azian herself had accepted as being the basis of the proposed contract of insurance as can be seen by the aforesaid clause (c) of the declaration made by her on the proposal form.

The contention of Encik Mohd. Yacob Karim for the plaintiffs is that even though the policy may not have been issued or delivered the Court should find that Azian's proposal for insurance had been accepted by the company when the $118.00 was received by AIA. It was contended that the issuance of the cashier's receipt on December 2, 1977 was conclusive evidence that the proposal dated November 21, 1977 had been accepted by the company on or before December 2, 1977. It was argued that the said notice at the back of the receipt was not binding on the payer on the strength of *Chapelton* v. *Barry U.D.C.*,[1] *Burnett* v. *Westminster Bank Ltd.*[2] and *Olley* v. *Marlborough Court Ltd.*[3]

Those cases do not say that all notices on receipts have no effect. What each of those cases points out is that it depends on the particular circumstances. Lord Goddard pointed out that while the conditions on the reverse of railway tickets, cloak-room tickets or documents issued by bailees when they take charge of goods may be binding on the person to whom that ticket or document is issued, in the case of the ticket for the hire of beach chairs the condition on the reverse of the ticket was not binding on the hirer in the circumstances in which that ticket had been issued on the facts in the *Chapelton* case (see page 539 of the report).

In the instant case in the said clause (c) of the declaration made by Azian in her proposal for assurance, reference is made to the application of "terms of the receipt" in the event payment of premium is made in cash. This is followed by a receipt on the face of it the purpose for which the money was paid or received is not stated and on the reverse of it in large print are the words "Conditions of Payment" followed by the conditions that have been reproduced earlier in the judgment. In my judgment in the circumstances obtaining in this case the $118.00 was received by AIA subject to those conditions. Accordingly the receipt of that amount does not amount to a waiver of the understanding between Azian and AIA set out in the said clause (c) of the declaration in the proposal that the assurance applied for was not to take effect until a policy was issued and delivered to Azian and the first premium actually paid in full. No policy was issued and accordingly there was no delivery. Further there is no evidence as to how much the premium was and what the $118.00 represented.

In my judgment at the time of the premature death of Azian there was no concluded contract of insurance between her and AIA and accordingly the claim fails. It is dismissed with costs.

Claim dismissed.

Solicitors: *Yacob, Woon & Rakan-Rakan; Skrine & Co.*

HARPER GILFILLAN (1980) SDN. BHD. v. KEAN TOH AMANG FACTORY SDN. BHD. & LEE KWEE HONG (CLAIMANT)

[O.C.J. (George J.) June 11, 1985]

[Kuala Lumpur – Application for Execution No. 432 of 1983]

Sale of Goods – Sale and agreement to sell – Property does not pass to the buyer in an agreement to sell – Only a right in personam is created.

Contract – Sale of land to run a factory – Permission of Mentri Besar required – Requirement of obtaining licence – Sale illegal & void.

Practice and Procedure – Seizure of movable goods in execution proceedings – Goods belong to judgment debtor even though there is an agreement to sell.

In this case the plaintiffs obtained judgment against Kean Toh Amang Factory Sdn. Bhd. (first defendant) in the sum of $46,000 which with interest stood at $48,507 unpaid. The plaintiffs caused a writ of seizure and sale to issue and the bailiff seized a number of movable goods at Amang factory. Later on one Lee Kwee Hong (claimant) filed an Order 17 rule 2 notice claiming all the goods seized as his own. He relied on a written sale and purchase agreement of an earlier date. According to their agreement, the defendant had agreed to sell the land and factory with movables for $280,000 to the claimant. The land could not be sold without the consent of Mentri Besar. The agreement provided in case the consent is not forthcoming, the agreement would be treated as null and void. The judgment creditor contended that on the date of seizure the Mentri Besar's consent had not been obtained, therefore property in the movables was still with the judgment debtor. He also contended that the sale was not *bona fide* as the two shareholders of the defendant company were the sister and sister's daughter of the claimant. The claimant told the court that he was not aware of any judgment debt against the defendants.

Held: (1) property in the movables did not pass to the purchaser on December 19 when they were seized by the bailiff;

(2) the agreement was a conditional agreement subject to the consent of Mentri Besar and the consent had not been given on the date of seizure of movables.

APPLICATION FOR EXECUTION.

Gurdial Singh for the claimant.
K. Kangasingam for the judgment creditor.

George J. : On August 22, 1983 in Kuala Lumpur High Court Civil Suit No. C 941 of 1983 Harper Gilfillan (1950) Sdn. Bhd. (Harpers) obtained judgment against Kean Toh Amang Factory Sdn. Bhd. in the sum of $46,000.00, interest and costs which on December 8, 1983 together stood at $48,506.92 unpaid. On that date Harpers caused a writ of seizure and sale to issue in respect of certain movable property which Harpers were to identify as belonging to the judgment debtor.

Pursuant to the said writ of seizure and sale, on December 19, 1983, the Bailiff of the Court seized a number of movable goods at an Amang Factory at the 18th mile Bota/Ipoh Road, Tronoh, Perak upon the factory and movables therein being identified by a representative of Harpers as being that of the judgment debtor.

On December 23, 1983 one Lee Kwee Hong filed an Order 17 rule 2 Notice (Form 28) claiming all the items seized. Harpers refused to admit the claim by the claimant and the Sheriff of the Court accordingly had to and applied for an Interpleader